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July 27, 1999

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Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.,
Washington, D.C. 20554

Re: CC Docket No. 96-45, DA No. 99-1331

Dear Ms. Salas:

Transmitted herewith, on behalf of Arizona Telephone Company (Arizona), are an original and five copies of its Opposition to Petition of Smith Bagley, CC Docket No. 96-45 and DA No. 99-1331.

In the event of any questions concerning this matter, please communicate with this office.

Very Truly Yours,

Margot Smiley Humphrey

Margot Smiley Humphrey

Enclosure

No. of Copies rec'd 0+5
List A B C D E

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Smith Bagley, Inc. for	)	CC Docket No. 96-45
Designation as an Eligible	)	
Telecommunications Carrier	)	DA No. 99-1331

OPPOSITION OF ARIZONA TELEPHONE COMPANY TO SMITH BAGLEY PETITION

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Table of Contents

		Page
I.	Arizona's Telephone Company's Interest	1
II.	SBI Does Not Meet the Requirements for Federal ETC Designation Jurisdiction Since It Is Subject to State Jurisdiction	2
III.	SBI Has Not Even Attempted to Demonstrate that Designating It as an Additional ETC for Any Federally-Reserved Native American Lands or Any Other Area Served by a Rural Telephone Company Is In the Public Interest	6
IV.	The Commission Has Not Adopted the Necessary Rules Specifying Obligations and Rights for Wireless Carriers that Obtain ETC Designation	8
V.	Conclusion	10

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OPPOSITION OF ARIZONA TELEPHONE COMPANY TO SMITH BAGLEY PETITION

Arizona Telephone Company (Arizona), by its attorneys, files this opposition to the Petition of Smith Bagley, Inc. for Designation as an Eligible Telecommunications Carrier (ETC) throughout its service area in Arizona. Arizona is well-versed in the need for universal service to Native Americans in rural areas, especially on federally-recognized reservations, and is dedicated to achieving and improving service to that important population segment. However, Arizona's opposition will explain that this Commission should deny SBI's request because (1) SBI is not within the scope of Section 214(e)(6) and is thus subject to state, not federal, ETC designation jurisdiction, (2) SBI has not shown that its designation in any area already served by a "rural telephone company" would meet the statutory test for additional ETC designations in any such carrier's area, which it would not, and (3) the Commission has not yet even adopted rules to govern what obligations, rates and portability arrangements apply to a wireless carrier, such as SBI, if it is designated as an ETC.

I. Arizona's Telephone Company's Interest

Arizona, a subsidiary of TDS Telecommunications Corporation, provides service as an incumbent local exchange carrier (ILEC) to about 3,600 access lines in Arizona, in a 1,508-square-mile service area. Three percent of Arizona's access lines are on federally-reserved Native American lands -- the Supai exchange at the bottom of Havasu Canyon, serving 101 access lines. Arizona also serves

four other exchanges that are in the three counties where SBI may be seeking broader ETC status, based on the statements in its state petition: Marble Canyon (114 access lines), Blue Ridge (863 access lines), Green Haven (247 access lines), and Mormon Lake (366 access lines). Smith Bagley, Inc. (SBI) requests (p. 1) that this Commission designate it as an ETC for "all of the federally reserved Native American lands within its service area" and has also asked the Arizona Corporation Commission to designate it "as an ETC for the entire state of Arizona."[1] Accordingly, Arizona has an interest in this designation proceeding as a Section 3(47) "rural telephone company" and an ETC that already provides universal service to Native Americans living on federally-reserved lands as well as to other rural subscribers in the state of Arizona.

II. SBI Does Not Meet the Requirements for Federal ETC Designation Jurisdiction Since It Is Subject to State Jurisdiction

[1] The SBI petition is inconsistent and ambiguous about what SBI serves and where it seeks designation. It also says at one point (p. 4) in its attached petition to the Arizona Corporation Commission that it seeks ETC designation only for three counties, asking for the necessary finding as to any rural telephone companies in these counties. SBI sometimes appears (p. 4 of the above-captioned petition to this Commission) only to intend to serve portions of four named tribal reservations, but also states on the same page that it "plans further expansion, with its goal being to provide usable signal to as many Native American persons as possible." Even if its expansive requests were narrowed to the three counties, however, one of the three counties, Coconino, includes Arizona's Supai service territory on federally-reserved lands, and the other exchanges mentioned above lie within the three counties. Moreover, since SBI also seems to be seeking designation for areas where it does not yet provide the legally designated universal services, as section 214(e)(1) requires, and even for non-federal territory, Arizona directs its comments also to ETC designation for any part of its rural telephone company service area.

Due to the confusion from SBI's varying descriptions of what it is seeking, Arizona will concentrate its response on the Supai federally-reserved service area that seems to fit within all versions of SBI's requests. Once SBI clarifies what it is requesting, Arizona and other potentially affected companies should be given a chance to provide more information on the impact to the areas that may or may not be included in SBI's petition. In any event, SBI has not complied with the requirement in the Commission's Public Notice on section 214(e)(6) petitions that the filing provide "a detailed description of the geographic service area that it requests the Commission [to] designate." Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, Public Notice FCC 97-419 (rel. December 29, 1997) (Public Notice).

Section 214(6) was enacted after the 1996 Telecommunications Act and the remainder of Section 214 (e) had become effective to remedy a specific gap that had been discovered in the 1996 Act's designation provisions – the fact that local exchange telephone companies owned by Native American tribes and providing service on federally-recognized reservations are not subject to state authority because the tribes possess sovereign powers for their reservations. The provision plainly indicates the limited situation that would bring the remedial federal jurisdiction into being: "the case of a common carrier providing telephone service and exchange access that is not subject to the jurisdiction of a State commission."

The legislative history is every bit as clear as the words of the provision that Congress intended only non-subject companies, such as tribal-owned telephone companies, to fall under the federal jurisdiction conferred upon this Commission. Senator McCain, co-sponsor of the legislation in the Senate, for example, engaged in a colloquy on the Senate floor with Senator Daschle, another co-sponsor, on November 12, 1997. Their exchange notes that states typically lack jurisdiction over "tribally owned companies," and adds later that "this bill does nothing to alter the existing jurisdiction that state commissions already have over local exchange carriers or providers of commercial mobile radio services as set forth in Section 332(c)(3) of the Telecommunications Act."[2]

Representative Hayworth's statement on the House floor on November 13, 1997[3] also confirms that the intent and effect of the legislation adding section 214(e)(6) was to "correct[ ] a technical glitch in section 214(e)" because the original law did

> "not consider whether a tribal-owned carrier is a traditional incumbent local exchange carrier that provides the core universal services, ... [has] previously received Federal universal support or ... will be deemed a carrier of last resort to serve every customer in their service area."

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[2] November 13, 1997 Cong. Rec. S12568.

[3] November 13, 1997 Cong. Rec. H10808.

He specifically pointed to the "four tribal authority telephone cooperatives that are not subject to State jurisdiction" in his "home State of Arizona" and endorsed passage of the legislation so "these entities can continue to serve their customers as eligible carriers."[4] Colloquy between Representatives Thune and Bliley during the House debate that day[5] also emphasized that "nothing in this bill is intended to expand or restrict the existing jurisdiction of State commissions over any common carrier or provider in any particular situation ...."[6]

The Commission read the law as Congress intended in its Public Notice. It pointed out that "[a]ny carrier that is able to be or has already been designated as an eligible telecommunications carrier by a state commission is not required to receive such designation from the Commission." SBI has not submitted the required "certification and brief statement of supporting facts demonstrating that the petitioner is 'not subject to the jurisdiction of a state commission'." SBI obliquely asks in a footnote (p. 3, n.3), without any showing of good cause, for waiver of any rules the Commission might unearth that "bear on this submission." This surely provides no excuse for ignoring the language and intent of section 214(e)(6).

SBI's claim that the Commission should designate it apparently proceeds from its belief (p. 2) that this Commission has ruled that carriers are not subject to state jurisdiction under section 214(e)(6) "where they provide service to federal Indian reservations." However, SBI has misread the precedent. The case it cites for this proposition involves four Arizona companies (no doubt the four that Representative Hayworth had referenced) that are fundamentally different from SBI. The four

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[4] Representative Markey also referred on the same day in the House debate to "finetuning" the 1996 Act for carriers that are "not subject to the jurisdiction of a State commission, including those telephone companies owned by certain federally-recognized Indian tribes .... "

[5] November 13, 1997 Cong. Rec. H10808.

[6] Id., at H10808-09

companies had demonstrated that they are not subject to state jurisdiction. The decision accepted their explanation, which was not challenged, that

> each company is "subject to the jurisdiction of the governing body of a distinct federally-recognized Indian tribe" and that "the Arizona Corporation Commission does not assert jurisdiction over the Companies." In further support of their assertion that they are not subject to the jurisdiction of a state commission, the petitioners assert that tribal councils have authorized operation of each of the Arizona companies. [7]

The four carriers had also submitted affidavits and tribal resolutions attesting to their compliance with the requirements of section 214(e)(6). SBI has provided no factual basis at all for its claim to be eligible for a section 214(e)(6) federal designation.

This Commission has not held, as SBI seems to contend, that every carrier that serves Native American reservation lands is not subject to state jurisdiction in Arizona. Indeed, Arizona Telephone Company has been designated as an ETC for its service areas by the Arizona Corporation Commission, including the federally-recognized Native American reservation territories it serves, and has received universal service support both before and since the 1996 Act became effective. SBI is no more owned by a tribal entity entitled to assert sovereignty than Arizona. It is simply another privately owned company subject to state regulation to the same extent as Arizona and other ILECs throughout the nation that serve federally-reserved Native American locations, but are not owned by the tribal authority. In this regard, Arizona is particularly concerned by SBI's request (p. 1) that it "receive all available support from the federal Universal Service Fund ("USF") for the federally reserved Native American lands within its service area." This sweeping request could be interpreted as a suggestion

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[7] Designation of Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., San Carlos Telecommunications, Inc., and Tohono O'odham Utility Authority as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, DA 98-392, AAD/USB File No. 98-28, 1998 FCC LEXIS 1042, paras. 3-4 (footnotes omitted) (CCB, 1998).

that SBI expects to be the only ETC to get support for serving any federally-recognized Native American reservation territory within its service area, without regard to what carrier provides universal service and receives support now or the clear language of section 214(e) (2) and (6).

It is particularly puzzling that SBI petitions for federal designation under the statutory provision for carriers that are not subject to state jurisdiction, but has attached to its petition a petition asking the state commission to designate it statewide (or maybe in three counties) as an ETC for the purposes of state universal service funding. Its notion that a company with no claim to tribal ownership can fit itself within section 214(e)(6) by (perhaps) confining its federal application to the Native American reservation portions of its service area and invoking state jurisdiction for the rest of its operations simply does not have any rational connection with the purpose of the federal designation amendment to section 214(e).

III. SBI Has Not Even Attempted to Demonstrate that Designating It as an Additional ETC for Any Federally-Reserved Native American Lands or Any Other Area Served by a Rural Telephone Company Is In the Public Interest

Incorrectly assuming that it is qualified to proceed under section 214(e)(6), SBI's petition for designation makes much (pp.4-5) of its supposed role in serving long-neglected areas and "telephoneless" Native Americans, claiming that in "many portions" of its area it "is the only telecommunications provider offering any service and it is doubtful that any wireline carrier will ever extend its lines to these areas" because its service area contains about six people per square mile. SBI contends (ibid.) that "the extent of its current network expansion into unserved areas qualifies it for USF funding" because it is already putting infrastructure in place.

However, it also asks for ETC designation for all reserved Native American lands, including "those areas within the reservations served by a rural telephone company," which are obviously neither telephoneless nor wholly unserved. It asks the Commission (p. 5) "to find that SBI's designation as an

ETC would serve the public interest [in these areas], as required by Section 214(e)(2) of the Act." But SBI provides no showing or explanation of why it would serve the public interest to designate it as a second supported carrier in rural telephone company areas already served by an ETC. Arizona serves its federally-reserved Native American area (and its other rural exchanges that may be within SBI's plans for ETC designation) with the help of RUS financing, which obligates the borrower to provide area-wide service to "the widest practicable number of rural users."[8] It has also put the necessary infrastructure in place and, unlike SBI, has the incumbent's "carrier of last resort" obligations.

Moreover, Arizona's service area as a whole has .70 access lines per square mile, while its Supai exchange, for example, has only .06 access lines per square mile. The Commission cannot rationally assume, as SBI would have it, that dividing such a thin market, served by Arizona only with the help of RUS financing and universal service support, by supporting two ETCs, will not have adverse consequences. Lines that SBI captured from Arizona, for example, would secure the support that Arizona now receives, without significantly reducing the costs of service. The cost burden left to be absorbed by Arizona's remaining customers would be increased. Even the extremely limited economies of scale available to a single carrier serving such a difficult area would be reduced still further. The tab for all the nation's ratepayers to fund the federal support mechanisms would likely increase, especially if the mechanism actually provided "sufficient" support for two carriers to provide service to some share of the few customers – such as the 101 lines in Supai village – in these rural markets.

In short, the Commission should reject SBI's presumptuous contention that the Commission should rule without any factual support or even argument that it is in the public interest to add another

[8] U.S.C. sec. 922; see, also, 7 U.S.C. sec. 921.

ETC to what SBI may intend to be every federally-reserved Native American area in Arizona already served by an incumbent rural telephone company – or perhaps even all high cost areas in the state of Arizona. To make such an unwarranted finding – or even to purport to make that finding about any individual reservation area in Arizona that a rural telephone company already serves as an ETC – would flout the special duty Congress imposed on the Commission and the states to investigate particular market facts and make meaningful public interest evaluations before designating a second ETC in a rural telephone company service area. That duty plainly requires scrutiny beyond the automatic designation available in other larger and less rural providers' areas, or Congress would not have adopted special rural finding and study area requirements. But SBI has provided as little in its application as it might if the automatic designation applied to these areas, too. The Commission owes Congress a more thorough evaluation than the SBI application makes possible.

IV. The Commission Has Not Adopted the Necessary Rules Specifying Obligations and Rights for Wireless Carriers that Obtain ETC Designation

Even if the Commission had jurisdiction to designate SBI as an ETC, it is premature to designate SBI before the Commission decides fundamental issues about the obligations and the rights a wireless carrier should have when it is designated as an ETC. Arizona is not suggesting that wireless carriers should not be designated as ETCs, of course. However, the Commission has yet to decide many basic questions that not only make it difficult for a wireless carrier to make an informed decision whether to enter a particular market, but also make it impossible for the Commission to evaluate the public interest in adding an additional ETC in a rural telephone company study area.

The Commission has not yet decided what terms of service a wireless carrier must offer to customers in an area where it is designated as an ETC. Its rulemaking about whether or how much free

time a wireless carrier must make available is pending.[9] There has been no guidance about what rates a wireless carrier must offer to ensure that its service is "affordable," since the Commission left that determination to the states, but ratemaking is one area in which the states do not generally have jurisdiction over wireless providers. The Commission has not addressed whether customers will be adequately served if a carrier that is exempt under section 332(c)(8) from providing equal access to interexchange carriers becomes their only provider, as when an earlier ETC relinquishes its ETC status under section 214(e)(4).

Other unresolved questions are not confined to wireless providers. For example, the Commission has not answered two letters from the Universal Service Administrative Company asking about how to tell if portable support is for a line that has been "captured," so that the former carrier must lose support or whether an incumbent might even be thought under the rules to lose support for any line for which a new ETC gets support. The Commission has not interpreted whether a newly designated ETC gets support only for "new" lines it begins to serve after designation, or whether lines it has been providing at full market rates in the past are supportable as "new" lines once it receives an ETC designation. And the Commission has yet to adopt a rule for "disaggregating" a rural telephone company's support so that there are not support windfalls and shortfalls during the rural transition when a new ETC gets support based on the incumbent's average study area-wide support, while the new ETC has substantial choices about how to serve, allowing it to receive averaged support but incur only below-average costs.

Until these questions are answered, the Commission cannot fulfil its statutory responsibility to find whether dual (or more) designations in Arizona's or another rural telephone company's area will

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[9] Federal-State Joint Board on Universal Service, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, paras. 46-54 (rel. October 26,1998).

serve the public interest. The Commission should not make such a public interest finding for SBI unless and until it can do so based on a meaningful record and thorough analysis.

V. Conclusion

The Commission should reject SBI's petition for designation as an ETC in federally-reserved Native American areas because SBI is a privately owned company and is subject to state jurisdiction in Arizona, which prevents it from qualifying for section 214(e)(6), the law under which it has filed its request. The Commission would also have to reject the petition even if it had jurisdiction, insofar as it seeks summary ETC designation for any areas in Arizona that are already served by ILEC ETC's that qualify as rural telephone companies, since SBI has not provided any facts or reasoning that can support a determination that designating additional ETCs in such areas would be in the public interest. Nor can the Commission make such a determination until it acts on numerous critical issues about wireless and non-wireless ETCs' obligations and support rights, since the Commission cannot evaluate the impact of designations until it knows the terms and conditions of new ETCs' service. Therefore, the Commission should deny the petition and instruct SBI to seek any designation as an ETC that it may wish to pursue before the Arizona Corporation Commission.

Respectfully submitted,

ARIZONA TELEPHONE COMPANY

By: /s/ Margot Smiley Humphrey
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July 27, 1999

CERTIFICATE OF SERVICE

I, Victoria C. Kim, of Koteen & Naftalin, hereby certify that true copies of the foregoing Opposition of Arizona Telephone Company to Smith Bagley Petition, CC Docket No. 96-45 and DA No. 99-1331, have been served on the parties listed below, via first class mail, postage prepaid on the 27th day of July 1999.

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